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No. 86-592

In The
Supreme Court of the United States

October Term, 1986

Syufy Enterprises,
Petitioner,
v.
American Multi-Cinema, Inc., AMC Film Management, Inc. and Durwood, Inc.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondents' Brief in Opposition

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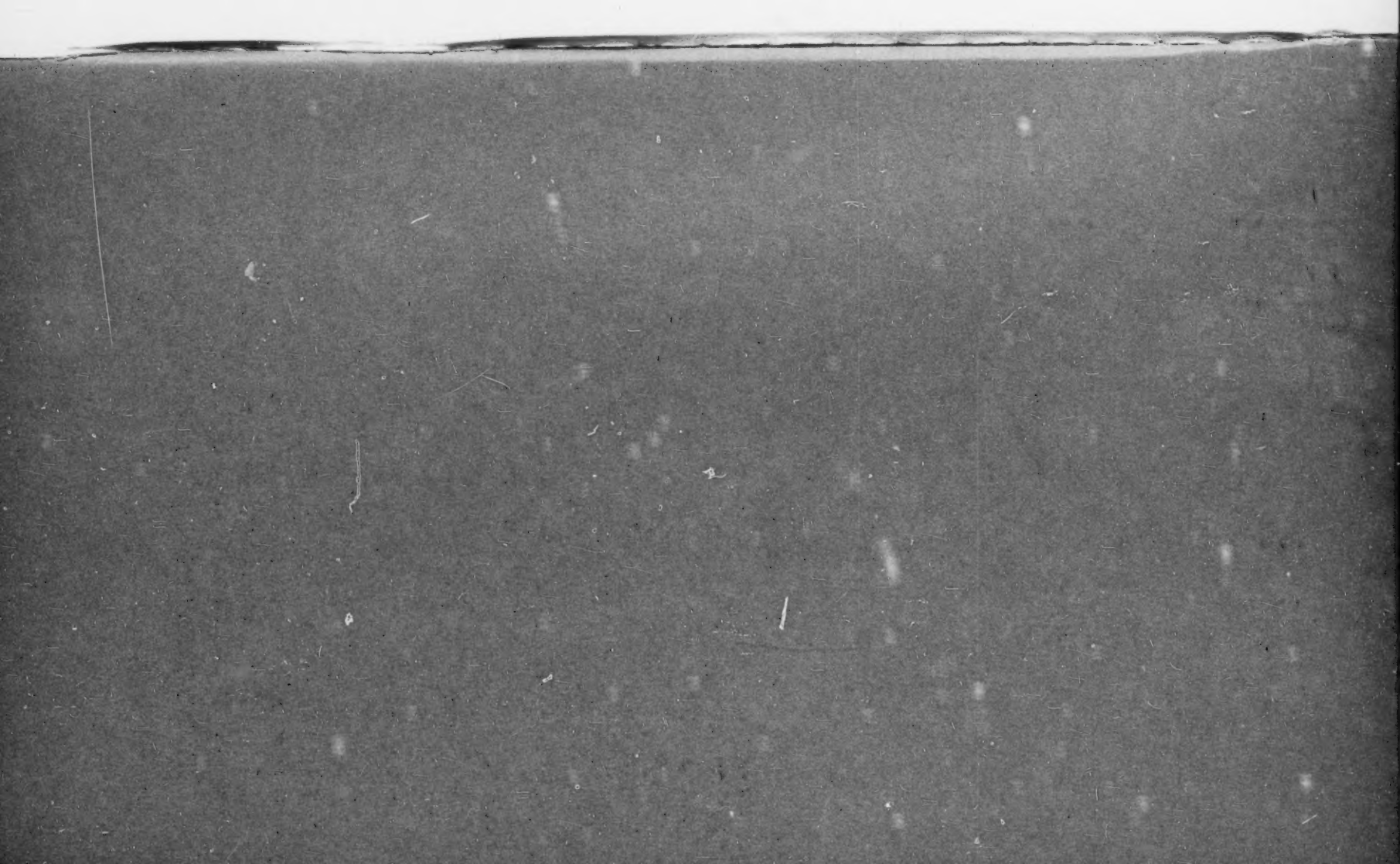

RESPONSE TO QUESTIONS PRESENTED

The questions presented in the petition are not based upon (a) the facts that were found to exist by the jury that decided the case in favor of respondent American Multi-Cinema, Inc. (AMC) or (b) the legal principles applied by the Ninth Circuit. The questions presented by petitioner Syufy Enterprises (Syufy) are:

1. Whether a motion picture exhibitor may be held to possess monopsony power over the distribution of films which are licensed through open, competitive bidding where the exhibitor has neither the ability to exclude other bidders nor the ability to control the auction price.

2. Whether the "substantial competition" test of *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) for determining the legality of exclusive film licenses in discrete locales survived this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) that the "rule of reason" governs all vertical non-price restraints and, consequently, whether the Court below erred in applying the former standard rather than the latter to the exclusive licenses awarded to a motion picture exhibitor.

THE PARTIES

The only proper respondent is AMC. The parent company of AMC is AMC Entertainment Inc. AMC Film Management, Inc. and Durwood, Inc. did not obtain judgment against Syufy and should not be parties to this proceeding.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondents' Brief in Opposition

AMC responds to the petition for writ of certiorari filed by Syufy to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 25, 1986, as modified on July 14, 1986, and requests that the petition be denied.

OPINIONS BELOW

The amended opinion of the Court of Appeals is reported at 793 F.2d 990 (Appendix A). The opinion of the district court is reported at 555 F.Supp. 418 (Appendix B).

JURISDICTION

AMC does not dispute the jurisdiction of this Court. AMC received an extension until December 10, 1986 to file its brief in opposition to Syufy's petition for writ of certiorari.

STATUTES INVOLVED

Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1 and 2, as set forth in Appendix C.

STATEMENT OF THE CASE

AMC's antitrust claims arise out of Syufy's dominance over the San Jose zone [1] and attempts of its owner, R.J. Syufy, to drive AMC out of "his town" [RT 1774-5]. In 1973 AMC perceived the need for additional first class theatres in the San Jose zone and consequently leased space in a shopping mall where it opened its 1,500 seat Oakridge theatre [RT 2243-4]. [2] When AMC opened its theatre, Syufy controlled the San Jose zone, licensing most of the major pictures [DX 8000-8023]. [3] Two years later AMC opened its six auditorium 1800 seat Saratoga theatre in the San Jose zone.

During the period relevant to this litigation (1976-79), AMC was the only new exhibitor to open a first class theatre

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[1] The San Jose zone was the relevant geographic market [Appendix B-10]. The San Jose zone included the cities of San Jose, Santa Clara, Sunnyvale, Saratoga, Campbell, Cupertino, Los Altos and Los Gatos, California. It contained an area of more than 130 square miles [PX 208]. More than one million people lived within the San Jose zone, one of the fastest growing metropolitan areas in the United States [RT 2028].

[2] First class theatres are newer and generally situated near areas of concentrated population. The major pictures are customarily exhibited in first class theatres [RT 1249].

[3] The major pictures comprised the relevant product market [Appendix A-5-7; RT 2767, 2772-3]. They are characterized by famous stars, directors and producers; large production costs and advertising budgets; release by the major distributors; greater film rental; and nationwide audience appeal [RT 2407, 2636-8, 2644; DX 8053-1]. Syufy's market share during the four years prior to the filing of AMC's counterclaim was in excess of 69% [DX 8000-8023].

in the San Jose zone.[4] Although operating theatres in cities near the San Jose zone, neither General Cinema Corporation, the country's largest exhibitor [RT 175-6, 1643], nor Plitt Intermountain Theatres, Inc., the divorced Paramount circuit, entered the San Jose zone [RT 181].

The lack of new entrants into the market was the result of barriers to entry created by Syufy's unreasonable clearances over the market [Appendix A-8].[5] Although San Jose experienced rapid population growth, there was no significant expansion by the existing exhibitors. The country's second largest exhibitor, United Artists Theatre Circuit, Inc., operated two theatres, but did not expand. Mann Theatre Corporation of California (Mann) operated one theatre and did not expand [RT 173]. Syufy considered Mann's theatre to be its strongest competitor [RT 821]. After Mann indicated it would no longer attempt to suppress competition from AMC through unreasonable clearances,[6] Syufy acquired Mann's theatre [RT 2812-3].

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[4] Syufy's statement of the case assumes that the jury resolved all issues of fact in its favor. For example, Syufy states at page 7 of its Petition that there was "undeniable physical evidence of new theatres springing up in San Jose." AMC presented substantial evidence to the contrary. The mere opening of a theatre did not constitute entry into the market. Unless a theatre successfully licensed the major pictures it was not a factor in the market [RT 3293]. The jury resolved this conflict in AMC's favor. Both the district court and the Ninth Circuit found substantial evidence to support the jury's determination. Syufy, nevertheless, continues to make arguments based upon factual inferences that are erroneous. AMC as the prevailing party is entitled to the benefit of all favorable factual inferences. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

[5] A factual predicate for Syufy's first question presented is that Syufy had no "ability to exclude other bidders" [Petition at i]. Both the district court [Appendix B-10] and the Ninth Circuit [Appendix A-8] found that Syufy had successfully created barriers to entry which excluded other exhibitors (bidders) from the market. The factual predicate for the first question presented is absent.

[6] *See* discussion *infra* at pp. 4-5 regarding Syufy's unreasonable clearance practices.

Syufy attempted to purchase AMC's theatres to eliminate AMC as a competitor [RT 2063]. When AMC refused to sell, R.J. Syufy threatened AMC and stated that if AMC did not sell out to Syufy, AMC would be "run out" of "his town" [Appendix A-15-6; RT 1774]. Thereafter, Syufy initiated this lawsuit claiming that AMC had monopolized and attempted to monopolize the exhibition of first run pictures in San Jose. These claims were based principally on the allegation that AMC engaged in a practice known as predatory bidding. After fully presenting its claims that monopoly power can exist in a bidding market, Syufy now seeks this Court's determination that the legal theory it advocated at trial is meritless. [7]

In the motion picture industry, distributors license pictures to exhibitors. One of the terms in a license agreement is clearance. Clearance defines the geographic area surrounding a theatre within which all other exhibitors are precluded from exhibiting the licensed picture [RT 939]. Exhibitors have historically competed to license and exhibit pictures in geographic areas known as zones [RT 3250]. When an exhibitor takes clearance over an entire zone, it is known as an exclusive run.

Prior to 1970 the major pictures were licensed to only one theatre in a zone—an exclusive run. In the early 1970's the substantial investment required to produce and distribute the major pictures caused the distributors to increase the number of theatres to which they would simultaneously license a picture in a zone [RT 3234-6]. By 1975 this form of exhibition, known as multiple run, or day-and-date, was utilized by distributors in all zones other than San Jose [RT 2022-4]. The San Jose zone was the only major metropolitan market in the United States where distributors did not license the major pictures on a multiple-run basis [RT 549-50, 2115, 2241, 2247, 2399, 2475, 2839-40, 3269].

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[7] If Syufy's present argument is correct, Syufy must have initiated this action for the sole purpose of preserving its dominant market position since it could not have prevailed against AMC.

Syufy refused to exhibit pictures unless distributors agreed to eliminate competition by granting Syufy clearance over all other theatres in the San Jose zone [RT 953-4, 2728-A]. This clearance resulted in Syufy having an exclusive run.[8] Syufy rigidly adhered to its clearance policy without any consideration of other market conditions on a picture-by-picture basis in a geographic area that experienced significant population growth [RT 998, 1025-6]. AMC proved that Syufy's clearance practice was unreasonable and anti-competitive [Appendix A-10]. It resulted in only one theatre being available for patrons to see a movie in a market consisting of more than one million people [RT 953-4]. Syufy employed this practice for the purpose of eliminating AMC and other exhibitors from the market [RT 952]. The evidence established that Syufy's purpose was accomplished [Appendix A-9-10].

REASONS FOR DENYING THE WRIT

I.

THE FIRST QUESTION PRESENTED WAS CORRECTLY DECIDED, REQUIRES REVIEW OF FACTUAL ISSUES AND DOES NOT INVOLVE AN ISSUE OF SIGNIFICANT IMPORTANCE

A. The Ninth Circuit correctly decided the issue.

Syufy asks this Court to decide "whether a firm can possess 'monopoly power' over goods or services sold through a fair, open bidding process"[9] [Petition at 6]. Syufy misconstrues the Ninth Circuit's decision and the issue. Contrary to Syufy's assertion, the Ninth Circuit utilized the proper antitrust criteria routinely applied and approved by this Court. *See United States v. E.I. Du Pont de Nemours & Company*, 351 U.S. 377, 379, 391 (1955); *Paramount* at 174;

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[8] The terms "clearance" and "exclusive run" when applied to Syufy's licensing practices were used interchangeably by the witnesses because Syufy's clearance practice always resulted in an exclusive run.

[9] Syufy raised this issue for the first time in its post trial motion [Appendix B-9]. The failure to raise an issue in a timely manner bars any right to seek this Court's discretionary review. *See* analysis, *infra* at p. 10.

American Tobacco Company v. United States, 328 U.S. 781, 794 (1946); *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945). No further review is warranted because the Ninth Circuit correctly decided the issue in favor of AMC.

The Ninth Circuit began its inquiry in the traditional manner by examining market share. The Court applied the holding in *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) that monopoly power ordinarily may be inferred from a predominant share of the market. *See also American Tobacco Company* wherein this Court held that in a competitive bidding/auction market a 68% market share established monopoly power.

After analyzing Syufy's market share, the Ninth Circuit then reviewed other indicia of monopoly power. The Ninth Circuit examined the following factors that demonstrated Syufy's monopoly power over the relevant four year period: (a) barriers to entry [Appendix A-8]; (b) lack of expansion by any competitor [Appendix A-8]; (c) lack of any significant competition [Appendix A-8]; and (d) expert testimony that Syufy possessed monopoly power [Appendix A-8-9]. Complete analysis of the market conditions resulted in a correct decision by the Ninth Circuit that Syufy possessed monopoly power.

Syufy's novel argument that competitive bidding immunizes monopolistic conduct misconstrues the Ninth Circuit's decision and is unrelated to the analysis utilized by the Ninth Circuit. [10] Moreover, Syufy's reliance upon the limited holding of *National Reporting Company v. Alderson Reporting Company*, 763 F.2d 1020 (8th Cir. 1985) is misplaced. In *National Reporting* the primary factor analyzed was a bidding situation for a one year contract. The Ninth

[10] In a similar situation this court held in *Paramount* that distributors who possessed a natural monopoly created by copyright were not immunized from Section 2 Sherman Act liability solely because there was competitive bidding for their pictures.

Circuit did not confine its analysis to one contract or a limited period of time. Instead, it applied the traditional indicia of monopoly power that have been regularly approved by this Court. None of these indicia were present or analyzed in *National Reporting*. The facts in this case render the decision in *National Reporting* inapplicable. [11]

Syufy's contention that the Ninth Circuit disregarded the teachings of *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) is predicated upon the mistaken conclusion that the Ninth Circuit relied only upon Syufy's market share to find monopoly power. The Ninth Circuit analyzed all relevant market criteria and did not disregard *Columbia Steel*. In *Columbia Steel* this Court examined several restraint of trade criteria, all of which were analyzed by the Ninth Circuit in concluding that Syufy possessed monopoly power. [12] Moreover, the *Columbia Steel* analysis was directed to a determination of whether a proposed acquisition would constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, and therefore involved a different legal analysis.

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[11] In *National Reporting* there were no barriers to entry and there was significant competition. *Id.* at 1023. In this case there were substantial barriers to entry and Syufy had no significant competition [Appendix A-8].

[12] The Court stated: "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed." *Id.* at 527-8.

B. Resolution of the question presented requires review of disputed facts.

This Court will not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). In order to decide the question presented in Syufy's petition, this Court would be required to engage in substantial factual analysis. [13] Syufy claims it did not possess monopoly power because there was "no proof of 'predatory bidding'" and there was "undeniable physical evidence of new theatres springing up" in the relevant geographic market [Petition at 7]. These incorrect factual assertions were a predicate for Syufy's argument that this court should grant Syufy's petition.

AMC proved that Syufy engaged in the predatory practice known as "buying clearance" to maintain its monopoly power and eliminate competition. AMC also proved that theatres were not "springing up" in the market. *See* the Ninth Circuit's resolution of these issues at Appendix A-10 and the district court's opinion at B-10. This Court should not grant Syufy's petition to review a factual dispute.

C. The question presented does not involve an issue of significant importance.

The determination of monopoly power depends upon a jury's review of numerous market factors. The presence or absence of bidding is merely one factor that may be involved in the determination of monopoly power. In this case the jury received proper instruction regarding its resolution of the facts which must be present before monopoly power could be found to exist. [14] No important precedent could result from a decision determining the question presented since the deci-

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[13] A major portion of Syufy's statement of the case is devoted to discussing Syufy's beliefs regarding the product market. This discussion is not relevant since Syufy has not sought review of the Ninth Circuit's determination of the relevant product market.

[14] Syufy raised no issue on appeal regarding the correctness of the jury instructions [Appendix A-2 n.3].

sion was based upon the particular facts that established Syufy's monopoly power.

II.
THE SECOND QUESTION PRESENTED WAS NOT RAISED BY THE DECISION BELOW, WAS CORRECTLY DECIDED AND REVIEW HAS BEEN WAIVED

A. Neither the decision below nor the record raises the question presented.

The second question presented is whether the "substantial competition" test of *Paramount* survived this Court's decision in *Sylvania* that the "rule of reason" governs all vertical non-price restraints [Petition at i]. The factual predicate for this question presented is absent. The Ninth Circuit did not decide this case in a manner that would raise the second question presented.

The Ninth Circuit held that Syufy's conduct in requesting and receiving unreasonable clearances was a willful or intentional act designed to acquire or maintain a monopoly [Appendix A-9-10]. A willful act to acquire or maintain monopoly power is the Section 2 test. *See Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585 (1985); *Grinnell* at 570-1 (1966). The Ninth Circuit correctly applied this test.

The substantial competition test [15] enunciated in *Paramount* is similar to the rule of reason test in *Sylvania*. Under *Paramount's* substantial competition test, the jury is entitled to review all competitive factors to determine whether there has been an unreasonable clearance. Under *Sylvania's* rule of reason test, the same competitive factors are the subject of analysis. *Id.* at 49, 52. *See also Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

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[15] The substantial competition test is but one of the seven factors utilized by the district court and approved by the Supreme Court in *Paramount*. 334 U.S. at 145-6.

B. The Ninth Circuit fully considered and correctly decided the issues.

In order to establish the conduct element of its monopolization claim, AMC was required to prove Syufy's monopoly power and (1) Syufy's willful acquisition or maintenance of monopoly power and/or (2) Syufy's intent to monopolize. *See United States v. Griffith*, 334 U.S. 100, 106 (1948); *American Tobacco* at 811, 814. AMC proved both willful acquisition or maintenance of Syufy's monopoly power and Syufy's intent to monopolize. The Ninth Circuit applied these tests to the evidence.

AMC proved Syufy's willful maintenance of monopoly through buying unreasonable clearance to eliminate AMC and other competitors [Appendix A-9-10]. AMC proved Syufy's intent by Syufy's own statements that it intended to run AMC out of the San Jose zone [Appendix A-15-16]. In essence, Syufy seeks this Court's review of the evidence. A writ of certiorari will not issue to review factual conflicts. *Johnston* at 227.

C. Review of the question presented has been waived.

At the close of AMC's evidence, Syufy made no motion for directed verdict. At the close of all evidence, Syufy made a motion for directed verdict, but did not claim that its conduct should be judged under the vertical non-price standard enunciated in *Sylvania*. Syufy's motions for judgment notwithstanding the verdict or alternatively, a new trial did not raise the issue. By failing to properly raise the issue before the district court, Syufy has waived its right to seek review. *See Clark v. Central States Dredging Co.*, 430 F.2d 63, 65 (8th Cir. 1970); *Jones Truck Lines, Inc. v. Argo*, 237 F.2d 649, 652 (8th Cir. 1956).

CONCLUSION

Neither of the questions presented were incorrectly decided by the Ninth Circuit. The factual predicate for both questions is not present. The questions presented do not raise issues of sufficient importance to invoke this court's discretionary review.

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Appendix A

Appendix A

Syufy Enterprises,
Plaintiff-Appellant/Cross-Appellee,

v.

American Multicinema, Inc.,
AMC Film Management Inc., and Durwood, Inc.,
Defendants-Appellees/Cross-Appellants.

Nos. 83-2725, 84-1728.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 13, 1984.

Decided Feb. 25, 1986.

As Amended on Denial of Rehearing and
Rehearing En Banc July 14, 1986.

Before CANBY and NORRIS, Circuit Judges, and STEPHENS,* Senior District Judge.

NORRIS, Circuit Judge:

In this antitrust case involving the exhibition of major feature films in the San Jose area, a jury returned a general verdict in favor of appellees American Multicinema, Inc. (AMC)[1] on its counterclaim against appellant, Syufy Enterprises. The jury awarded AMC damages totaling $1,006,421. Judgment was entered for that amount trebled and for attorney's fees.[2]

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* The Honorable Albert Lee Stephens Jr., Senior United States District Judge for the Central District of California, sitting by designation.

[1] AMC's corporate structure includes three related entities. AMC owns and operates the exhibition screens; AMC Film Management, Inc. acts as a film buying and booking agent for AMC theatres; and Durwood, Inc. owns a controlling interest in both AMC and AMC Film Management.

[2] The jury also found in favor of AMC on the antitrust claims raised by Syufy in its complaint. Syufy does not appeal that part of the verdict. In addition, the district court granted a directed verdict in favor of Syufy

The case went to the jury on AMC's claims that Syufy monopolized, attempted to monopolize and conspired to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982). Syufy's principal arguments on appeal relate to the sufficiency of the evidence to support the general verdict in favor of AMC.[3] Syufy also challenges the admission of certain evidence.

Syufy contends that the district court erred in failing to grant a judgment *non obstante veredicto*. The standard for determining the propriety of a judgment n.o.v. is the same for district and appellate courts. *California Computer Products v. International Business Machines, Inc.*, 613 F.2d 727, 734 (9th Cir. 1979). It is also the same as the standard for determining the propriety of a directed verdict: whether, "viewing the evidence as a whole, there is substantial evidence present that could support a finding . . . for the nonmoving party." *Id.* (quoting *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1140 (9th Cir.), *cert. denied*, 419 U.S. 1023, 95 S.Ct. 500, 42 L.Ed.2d 298 (1974)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Washington v. United States*, 214 F.2d 33, 41 (9th Cir.), *cert. denied*, 348 U.S. 862, 75 S.Ct. 86, 99 L.Ed. 679 (1954).

Four distinct theories of Section 2 violations by Syufy were submitted to the jury. We hold that the evidence was sufficient to support a jury finding that Syufy violated Section 2 with respect to two of the theories: that Syufy monopolized and attempted to monopolize the San Jose hardtop major film exhibition market. We further hold that the evidence was inadequate to support a verdict for AMC with respect to the remaining two theories: that Syufy violated Section 2 by leveraging its monopoly power in the San Jose drive-in theater market and that Syufy conspired to monopolize the major film hard-top exhibition market. Finally,

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on AMC's claim that Syufy conspired to restrain trade in violation of Section 1 of the Sherman Act.

[3] Syufy does not contest the jury instructions on appeal.

we reject Syufy's arguments that the district court erred in admitting certain evidence.[4]

Part I of our opinion addresses AMC's theory that Syufy monopolized the hardtop market. Part II considers AMC's theory that Syufy leveraged its monopoly power in the drive-in market to gain a competitive advantage in the hardtop market. Parts III and IV evaluate the attempt to monopolize and conspiracy to monopolize theories. In Part V, we consider whether the general verdict may be affirmed as attributable to one of AMC's two viable theories. Part VI responds to Syufy's claim that the trial court erred by admitting evidence concerning Syufy's acquisition of the Mann Theater. In Part VII we address Syufy's contention that AMC's damage estimates were flawed.

I. THE THEORY THAT SYUFY MONOPOLIZED THE MAJOR FILM HARDTOP EXHIBITION MARKET

AMC's monopolization claim stems from Syufy's extensive ownership of both drive-in and hardtop movie theaters in the San Jose area. During the relevant period, Syufy owned all four drive-in theater complexes in the San Jose market. Syufy also operated a total of fifteen screens in large domed hardtop theaters, each with a seating capacity of 680-900 people. Syufy's domed hardtop theaters were known as "event" theaters because of their wide screens, state of the art sound, high ceilings and rocking chair seats.

During the same period, AMC owned and operated four theater complexes in the San Jose area. Each complex housed six auditoriums with seating capacities of approximately 250 people. AMC's theaters were generally located within shopping malls and lacked many of the amenities found in Syufy's hardtop theaters.

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[4] Syufy also argues that in setting the rate of interest on the judgment, the district court erred in applying retroactively both California (Cal.Civ.Proc.Code § 685.010 (West Supp.1986)) and federal (28 U.S.C. § 1961 (1982) statutes enacted after the date of judgment. We need not reach this issue because we vacate the district court's judgment and remand for a new trial. Clearly, any judgment entered subsequent to this opinion will be governed entirely by 28 U.S.C. § 1961.

But AMC's theaters were conveniently located and offered greater selection of movies than Syufy's theaters. They also charged, on average, a lower admission price.

AMC claims that Suyfy used its dominant position in the ownership of both hardtop and drive-in theaters to monopolize the exhibition of major films in the San Jose area. AMC advanced two discrete theories in support of this claim. AMC's first monopolization theory is that Syufy effectively deprived AMC of any chance to compete for major motion pictures in the San Jose area by using its dominant position in the market to license such pictures on an exclusive basis.

To establish monopolization under Section 2 of the Sherman Act, "a plaintiff must prove: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal 'antitrust' injury." *Transamerica Computer Co., Inc. v. International Business Machines Corp.*, 698 F.2d 1377, 1382 (9th Cir.), *cert denied*, 464 U.S. 955, 104 S.Ct. 370, 78 L.Ed.2d 329 (1983); *see also California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 735 (9th Cir. 1979). Thus, we must decide whether AMC presented substantial evidence with respect to each of the three elements of a monopolization claim.

A. Monopoly power.

Monopoly power—the first element of monopolization—is the power to control prices or exclude competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956). We begin our analysis of the issue of market power with a discussion of market definition and then turn to the question whether there is substantial evidence that Syufy had monopoly power within the relevant market.[5]

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[5] We utilize this simplified structural approach—rigidly bifurcating market definition from the question of power within the defined market. *see generally* L. Sullivan, *Handbook of the Law of Antitrust* 33-35 (1977).—because it has been adopted by the parties. We do not imply that this is the exclusive way to approach the question of market power.

1. Market definition.

We begin by considering the definition of the relevant market within which Syufy allegedly possessed monopoly power. *See United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir.1945) (*"Alcoa"*). Relevant market is a factual issue which is decided by the jury; the court is not permitted to account for witness credibility, weigh the evidence, or reach a different result it finds more reasonable as long as, viewing the evidence in a light most favorable to the nonmoving party, the jury's verdict is supported by substantial evidence. *Los Angeles Memorial Coliseum Comm'n v. N.F.L.*, 726 F.2d 1381, 1392 (9th Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984).

AMC defined the relevant market as the market for exhibition of industry anticipated top-grossing motion pictures in the San Jose area. Syufy does not dispute the geographic component of this definition—the San Jose area. Nor does it dispute limiting the product market definition to hardtop theaters. The only aspect of AMC's market definition that Syufy disputes is the limitation of the relevant product market to the exhibition of major films, more specifically to industry-anticipated top-grossing films. Syufy argues that this market definition is ex post facto and ad hoc, and that all first run films are in substantial competition with each other.

In evaluating Syufy's challenge, we begin with the principle that assessment of a product market definition must take into account whether products excluded from the definition are "interchangeab[le] in use" with those included in the market and whether there is "cross-elasticity of demand" between excluded and included products. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 394-95, 76 S.Ct. 994, 1006-07, 100 L.Ed. 1264 (1956). In economic terms, we might recharacterize Syufy's argument as follows: all first run films are interchangeable in use and the price and availability of any one film will affect the demand for all other films. Top-grossing films, Syufy argues, are simply those films that prove to be highly successful in the market place, but they possess no special characteristics that differentiate them from less successful films from an ex ante perspective. Syufy also argues that limiting the product definition to top-

grossing films has the effect of irrationally and unfairly penalizing the exhibitor with the prescience to book films that later prove to be big hits with the movie-going public.

AMC's rejoinder is that Syufy's argument mischaracterizes the product market definition. AMC points out that it did not define the market as simply top-grossing films, but as *industry anticipated* top-grossing films. AMC argues that these films can be differentiated from other first run films from an ex ante perspective because they have larger budgets, "name" stars and directors, larger advertising budgets, command large guarantees, and possess other distinctive characteristics which can be identified before the film is released. In economic terms, the viability of AMC's product market definition depends on the proposition that anticipated top-grossing films are not interchangeable with other films in the eyes of consumers and that price increases or supply constrictions for such films do not result in a shift in consumption patterns to other films. In legal terms, the question is whether the films excluded from the definition are "interchangeab[le] in use" with those included in the market and whether there is "cross-elasticity of demand" between excluded and included products. *United States v. E.I. duPont de Nemours & Co.*, 315 U.S. 377, 394-95, 76 S.Ct. 994, 1006-07, 100 L.Ed. 1264 (1956). In more colloquial terms, the viability of the proposed definition depends on the argument that if the price for admission to *E.T.* goes up, audiences will not flock to *My Dinner with Andre.*

We conclude that there is sufficient evidence in the record to permit a rational jury to conclude that industry anticipated top-grossing films constitute a distinct product market. The evidence indicates that approximately thirty pictures a year are identifiable as "anticipated top grossing films" on the basis of such criteria as national advertising support, longer playtimes, guaranteed rentals, famous stars, directors and producers, booking in first class theatres, and lucrative terms offered for the pictures by exhibitors. AMC compiled a list of the industry anticipated top-grossing films based on bidding materials submitted by both Syufy and AMC. Although AMC did not present direct evidence going to the "cross-elasticity of demand" between this limited class of pictures and other films, the jury could reasonably have concluded

from the evidence presented that the industry anticipated top-grossing films were not in substantial competition with other films.

2. Monopoly power within the relevant market.

Syufy contends that even if AMC's market definition is valid, AMC failed to prove that Syufy possessed monopoly power within that market. Syufy argues that the only evidence probative of its market power is that it had a 60-69% share of the market, which Syufy claims is insufficient, standing alone, to establish that it had monopoly power. Under existing antitrust case law, the question whether a 60-69% market share is sufficient, standing alone, to support a finding of monopoly power is a perplexing one. Ever since Judge Learned Hand laid down his rule of thumb in the *Alcoa* case that a ninety percent market share "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not," *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir.1945), courts have struggled with the question of the minimum market share necessary to establish monopoly power. In *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), the Supreme Court, acknowledging that "[t]he existence of such [monopoly] power ordinarily may be inferred from the predominant share of the market" (*id.* at 571), held that a market share of 87% could sustain a finding of monopoly power. But as far as we know, neither the Supreme Court nor any other court has ever decided whether a market share as low as 60-69% is sufficient, standing alone, to sustain such a finding.

AMC argues that we need not decide that abstract question because the record contains evidence other than Syufy's market share that is probative of Syufy's power to control prices or exclude competition in the San Jose market. AMC relies upon *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir.1975), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976), for the proposition that a 45-70% market share, if accompanied by other relevant factors, may support a finding of monopoly power. In *Sunkist*, this court observed that "it is now well settled that market share, while

being perhaps the most important factor, does not alone determine the presence or absence of monopoly power." *Id.* at 1204. We held that when Sunkist's market share, which ranged from 45% to 70%, was coupled with such factors as highly fragmented competition and Sunkist's acknowledged control over the supply market, the jury's finding of monopoly power could be sustained.

In the case before us, as in *Sunkist,* Syufy's 60-69% market share is accompanied by a fragmentation of competition. One of AMC's expert witnesses computed market shares for both first run films and the 100 top-grossing films for the period 1975 through 1980. These calculations indicated that while Syufy's share ranged from 71.8% to 54.7%, no competing exhibitor in the San Jose area ever had a greater share than 24.7% and in some years the top competitor's share was below 12%.

In addition to the factors of Syufy's market share and the fragmentation of competition, there was evidence of a third factor that the jury could have considered in finding that Syufy had monopoly power in the relevant market—barriers to prospective competitors seeking entry to the market. There was testimony, for example, that while exclusive runs were becoming less and less common in other parts of the country, they persisted in the San Jose market, and that exclusive runs were probably a deterrent to the establishment of more theaters in the area. Still another indicator of barriers to entry was the evidence that Syufy extracted excessive clearances from distributors of certain films.[6] Viewed in the light most favorable to AMC, the evidence would permit a rational jury to find that barriers to entry existed in the San Jose market.

Finally, as evidence that Syufy had monopoly power, AMC cites the testimony of AMC's expert witness, Maurice Silverman. His qualifications as an expert witness were based upon years of experience relating to the film industry in his capacity as an antitrust law-

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[6] We discuss the evidence on excessive clearances below in section B of this part of our opinion.

yer in the United States Department of Justice.[7] His conclusion that Syufy possessed monopoly power in the relevant market was based upon a cursory study of the San Jose film exhibition market, including an analysis of the market share statistics and the demographics of the area. On cross examination, Silverman admitted that he had failed to consider such basic indicators of monopoly power as barriers to entry, price differentials, and profit margins. Moreover, his study of the market did not include important variables such as clearances, attendances figures, or even the number of screens within the region. Reporter Transcript ("R.T.") at 3303-39. Despite these shortcomings, the jury was entitled to give Silverman's testimony some weight.

We conclude, consistent with *Sunkist,* that when the evidence is viewed in the light most favorable to AMC, Syufy's market share of 60-69%, when coupled with other evidence of additional factors, is adequate to support a jury determination of monopoly power in the market defined as the exhibition of anticipated top-grossing films in the San Jose area. Here the additional factors include the fragmentation of competition, the presence of barriers to entry, and the existence of excessive clearances. Moreover, the jury in this case could reasonably have assigned some weight to the testimony of AMC's expert witness, Maurice Silverman.

B. Willful Acquisition or Maintenance of Monopoly Power.

We have no difficulty finding substantial evidence in the record that Syufy willfully maintained its monopoly power in the San

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[7] Syufy objects for the first time on appeal to the admission of Silverman's testimony. Syufy argues that his opinion testimony had no basis in the evidence and further that his testimony should have been excluded because the identification of Silverman as an official antitrust enforcer prejudiced the jury. AMC replies that Syufy failed to object at trial and that hence it has waived its objection under Fed.R.Evid. 103. Syufy has fallen far short of demonstrating that the admission of Silverman's testimony was plain error. Despite the shortcomings of Silverman's testimony regarding the particular relevant market in question, he qualifed as an expert in antitrust matters, and although his testimony about the San Jose film exhibition market was of marginal value, it was not plain error to admit it.

Jose area. Daniel Marks, AMC's film buyer, testified that, in his opinion, Syufy had been engaging in buying clearances which were excessive, defined as clearances that encompass a greater geographical area than is justified for legitimate competitive reasons. R.T. at 2787-89. The clearance for a particular theater is excessive if it reaches beyond the geographic zone within which the theater draws significant numbers of customers. Marks's testimony—that Syufy had submitted bids with large guarantees and lucrative terms in order to obtain clearances that were excessive—is probative of the willful maintenance of monopoly power. Although Syufy can point to evidence in the record indicating that its clearances were not excessive, it is for the jury, not this court, to resolve such evidentiary conflicts.[8]

C. Causal Antitrust Injury.

In addition to Mark's testimony that Syufy had engaged in the practice of buying excessive clearances, Marks also testified that AMC had been injured as a result of such clearances. This testimony was not challenged by Syufy on cross-examination or otherwise. Marks, as AMC's film buyer, was qualified to give his opinion on this issue. Although Marks's testimony was not supported by specific examples, it stands as sufficient evidence to support a jury finding of causal antitrust injury.

In conclusion, we hold that there is substantial evidence to support a jury verdict in favor of AMC on its first Section 2 monopolization theory: that Syufy monopolized the market for the exhibition of industry anticipated top-grossing films in the San Jose area.

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[8] Marks testified that in his opinion the Syufy domed theaters and AMC's Oakridge theaters were not in substantial competition with each other. Although Marks may have contradicted himself by stating that the AMC's Old Mill theater, which is located farther away from the Syufy domes than either the Saratoga or Oakridge theaters, had some competitive effect on Syufy's domed theaters, it is the province of the jury to judge credibility and choose from conflicting inferences. R.T. at 3120.

II. THE THEORY THAT SYUFY LEVERAGED ITS MONOPOLY POWER IN THE DRIVE-IN MARKET IN ORDER TO GAIN A COMPETITIVE ADVANTAGE IN THE HARDTOP MARKET

AMC's second monopolization theory is that Syufy used its undisputed monopoly power in the San Jose drive-in theater market as leverage to influence the licensing of films in the hardtop theater market[9]. AMC claims that Syufy leveraged its drive-in monopoly power in a way that restricted AMC's ability to license major motion pictures for exhibition in its hardtop theaters. AMC points to restrictive bids submitted by Syufy for its drive-in theaters as evidence of this leverage power. Such bids offered to play a particular motion picture in its drive-in theaters on the condition that the film could play only one hardtop theater in the area. For example, Syufy submitted a bid to the distributor of *The Electric Horseman* to have that film play in Syufy's Capitol Drive-in Theater. The bid contained the following condition: "First to play with one hardtop". This condition, if accepted by the distributor, would have restricted the licensing of *The Electric Horseman* to a single hardtop theater in the San Jose market. Because Syufy owned a majority of the large hardtop theaters in the San Jose area as well as all the drive-ins, a distributor acceptance of the restricted bid for *The Electric Horseman* could readily have led to an exclusive run of the film at a Syufy hardtop theater.

AMC's leverage theory is analagous to one advanced by the government in *United States v. Griffith*, 334 U.S. 100, 103-04, 68 S.Ct. 941, 943-44, 92 L.Ed. 1236 (1948). There the government claimed that four film exhibitors who owned all the theaters in one town leveraged their monopoly position to influence the licensing of films in another town where the film exhibition

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[9] The district judge's instructions to the jury discussed the leveraging theory as a component of the general section 2 monopoliazation claim. But the legal and evidential requirements of the two theories are so distinct (e.g., the existence and impact of monopoly power in another market) as to merit separate treatment.

business was highly competitive. The Supreme Court stated in *Griffith:*

> A man with a monopoly of theaters in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. . . .
>
> The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations.

334 U.S. at 107-08, 68 S.Ct. at 945-46. Thus, under the *Griffith* analysis, Syufy would violate Section 2 if it acquired "exclusive privileges" in the hardtop theater market by using its monopoly of drive-in theaters as a "trade weapon" against its hardtop competitors.

And yet, a restrictive Syufy bid standing alone does not prove a claim of monopolization. To demonstrate causal antitrust injury from Syufy's use of leverage, AMC must also prove that one or more of Syufy's restricted bids were accepted by distributors, and that as a result Syufy gained a competitive edge in the hardtop market in the form of an exclusive run in a Syufy hardtop theater. Thus it is not sufficient for AMC to prove that Syufy made the restrictive bid on *The Electric Horseman;* it must also prove that the bid was accepted and that as a result *The Electric Horseman* was booked into a Syufy hardtop theater for an exclusive run. In short, AMC must prove that Syufy succeeded in its alleged scheme to leverage its monopoly power in the drive-in market to acquire "exclusive privileges" in the hardtop market.

We agree with Syufy that AMC's leverage claim fails for lack of proof that Syufy succeeded in acquiring a single exclusive hardtop run by submitting restricted bids on films to exhibit in its

drive-in theaters.[10] The only evidence[11] relevant to AMC's leverage theory is a list of nine films for which Syufy allegedly made restricted bids. Defendants' Exhibit 8135. The list is sketchy in detail and vaguely cross-referenced to other supporting exhibits. When closely examined on a film-by-film basis, it fails to yield substantial evidence to support AMC's Section 2 leverage claim. As to seven of the nine films on the list, there is no evidence of distributor response one way or the other[12] As to one of the two remaining films—*The Electric Horseman*—the evidence shows that the restricted bid was rejected by the distributor. The evidence shows that a restricted bid for only one of the nine films—*The China Syndrome*—was accepted. But the evidence also shows that *The China Syndrome* never played at a Syufy hardtop theater. Thus the evidence fails to prove that Syufy ever succeeded in leveraging its monopoly power in the drive-in theater market to obtain exclusive licenses for films in the hardtop market. The record simply fails to yield any evidence of causal antitrust injury. We hold that AMC's leverage theory fails for lack of proof.

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[10] Thus, we need not enter into the debate concerning the anticompetitive effects of leverage. *Compare* 5 P. Areeda & D. Turner, *Antitrust Law* ¶ 1129c, 1134b (1980), and R. Bork, *The Antitrust Paradox* 140-44, 372-75 (1978) *with* L. Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum.L.Rev. 515 (1985).

[11] AMC's brief does include citations to other portions of the record that are alleged to support the leverage theory. But we find these citations to be totally unhelpful. One citation to page 2494 of the Reporter's Transcript leads us to testimony that bears no relationship to the proposition AMC claims it supports. The other citation, to pages 3257-58 of the Transcript, leads us to testimony by Silverman expressing a legal opinion that *if* Syufy successfully used leverage it would be guilty of monopolization.

[12] In addition, four of the nine films were not included in the product market defined by AMC, which was the only market in which AMC claimed causal antitrust injury and damages.

III. THE ATTEMPTED MONOPOLIZATION CLAIM

AMC relies upon two discrete theories in support of its claim that Syufy attempted to monopolize the hardtop theater market in violation of Section 2 of the Sherman Act. The first theory was a variation of its failed leverage theory. AMC claims that Syufy attempted to monopolize the hardtop theater market by attempting to use its monopoly power in the drive-in market to license films in Syufy's hardtop theaters on an exclusive basis. This theory fails for the same reason—lack of evidence of causal antitrust injury—AMC's monopolization claim based upon a leverage theory fails.

AMC's second theory of attempted monopolization is more straightforward: that Syufy attempted to monopolize the hardtop market. It is clear that a case of attempted monopolization cannot be sustained in the absence of any of the following elements: (1) specific intent to monopolize, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) causal antitrust injury. *See Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1382 (9th Cir.), *cert. denied*, 464 U.S. 955, 104 S.Ct. 370, 78 L.Ed.2d 329 (1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027-29 (9th Cir.1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed.2d 61 (1982); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964); *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488, 504 (9th Cir.1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978).[13]

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[13] The question whether "dangerous probability of success" is an element of attempted monopolization appears to have generated a measure of confusion in this circuit. *Compare Lessig v. Tidewater Oil Co.*, 327 F.2d 459 ("dangerous probability of success" not an element of attempted monopolization) *with Transamerica Computer Co., Inc.*, 698 F.2d 1377, 1382 (9th Cir.1983) ("dangerous probability of success" is an element) and *California Computer Prods., Inc.*, 613 F.2d at 736 (same). Because of its large market share, Syufy cannot seriously argue that AMC's attempted monopolization claim fails on the ground that AMC failed to prove "dangerous probability of success." For this

A. Specific Intent

As evidence of specific intent to monopolize, AMC cites the testimony of its chief executive officer, Mr. Durwood, concerning a conversation he had with Mr. Syufy, the chief executive officer of Syufy. The relevant portions of the testimony follow:

> Q. And can you tell us what Mr. Syufy told you and what you told Mr. Syufy?
>
> A. Well, we had—we had met in Los Angeles when we discussed trying to buy—making us an offer of the depreciated book value, and so on, which didn't excite me too much.
>
> Q. That's what you told us about this morning, correct?
>
> A. Yes.
>
> Q. Can you concentrate on this phone call that you just identified?
>
> A. On the phone call he said—his voice hit a crescendo. He got pretty high decible count. He threatened to sue. He's going to start a massive building program against us if we didn't sell out.
>
> San Jose is his town. He said he had 20 million dollars in cash and he was going to use it to build theatres against us.
>
> Q. Is that something that appears in your notebook, which is exhibit No. 50, sir?
>
> A. Yes, sir.
>
> Q. Did you write those notes down on or about the time of the phone call?
>
> A. As soon as I could get calmed down after hearing this conversation.
>
> Q. Is there anything else you can recall of this conversation with Mr. Syufy?

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reason, we need not address the question whether proof of "dangerous probability of success" is required.

> A. No. He reiterated he wanted the eight domes exclusive, he wasn't going to share any product with us. If we didn't get out of San Jose, he was going to run us out. And he had 20 million dollars he could do it with.

R.T. at 1774-75.

Although Mr. Syufy's remarks to Mr. Durwood are arguably consistent with a simple desire to succeed in free and open competition, the jury could reasonably have inferred a specific intent to monopolize from the threat to run AMC out of town.

B. Anticompetitive Conduct

As to the second element of attempted monopolization—anticompetitive conduct—the Marks testimony that Syufy had bought excessive clearances, discussed in Part I-B above with respect to AMC's hardtop monopolization claim, also serves as substantial evidence of anticompetitive conduct. If Syufy did indeed buy more clearance than needed for legitimate competitive reasons, then it engaged in conduct that would have been indisputably anticompetitive.

C. Causal Antitrust Injury

We agree with AMC that there was adequate evidence before the jury to support a finding that antitrust injury was caused by Syufy's anticompetitive conduct in obtaining excessive clearances. The Marks testimony offered with respect to causal antitrust injury on the hardtop monopolization claim is also substantial evidence of causal antitrust injury with respect to the attempted monopolization claim.

In sum, we hold that the district court did not err in denying a judgment n.o.v. on AMC's attempted monopolization claim.

IV. CONSPIRACY TO MONOPOLIZE CLAIM

The final theory of liability submitted to the jury on AMC's counterclaim was that Syufy conspired with film distributors to monopolize the San Jose market in violation of Section 2 of the Sherman Act. At trial, the district court submitted the Section 2 conspiracy claim to the jury even though it granted a directed

verdict on AMC's Section 1 conspiracy claim.[14] Because AMC did not cross-appeal the directed verdict on the Section 1 claim, we are faced with an unusual situation in that we must review a Section 2 conspiracy claim which is unaccompanied by a Section 1 conspiracy claim.[15] As Professors Areeda and Turner have observed,

> [E]very combination or conspiracy that offends antitrust policy can easily be held to be an unreasonable restraint of trade, without the need for considering the additional complexities that flow from using the § 2 monopoly concept. There is therefore no need whatever to try to define the content of the § 2 conspiracy.

3 P. Areeda & D. Turner, Antitrust Law ¶ 839 (1978). Although we are not required in the case before us to decide the question whether a Section 2 conspiracy is always actionable under Section 1, we are required by the unusual posture of this case "to define the content of the Section 2 conspiracy."

Our task is complicated because the nature of AMC's Section 2 conspiracy claim is murky at best. AMC claims it proved a conspiracy to monopolize between Syufy and the major film distributors, but fails to specify whether it is talking about a single grand conspiracy involving all the major distributors and Syufy, or about six separate conspiracies, each one involving a single

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[14] On appeal, Syufy claims that the district court submitted the Section 2 conspiracy claim to the jury inadvertently because it overlooked the directed verdict it had granted on the Section 1 claim. The record is clear, however, that the district court acted deliberately in submitting the Section 2 conspiracy claim to the jury. It did so after counsel for Syufy called the court's attention to the directed verdict on the Section 1 claim. We also note that appellant did not object to jury instructions on the Section 2 conspiracy claim.

[15] Section 1 of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal." 15 U.S.C. § 1 (1982). The relevant portion of Section 2 reads, "Every person who shall . . . combine or conspire with any other person or persons, to monopolize any part of commerce shall be deemed guilty of a felony." 15 U.S.C. § 2 (1982).

distributor and Syufy. In any case, we hold that the district court should have granted Syufy's motion for judgment n.o.v. with respect to the Section 2 conspiracy to monopolize claim because there is no evidence that any of the distributors, in licensing films to Syufy, knew or even should have known that Syufy would use the film licenses for monopolistic purposes. Nor is there any showing that any of the distributors shared with Syufy a common purpose in monopolizing the hardtop theater market in the San Jose area.

As we read the cases, a supplier who licenses a product to another does not join the licensee in a conspiracy to monopolize merely because the licensee turns around and exploits the license for its own monopolistic purposes. Some courts have said that a specific intent to monopolize is required to make one a Section 2 conspirator. *See J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 796 (5th Cir.1983); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926 (9th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981). In *United States v. Paramount Picures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948), the Supreme Court held that acquiescence in conduct with knowledge that it was anticompetitive was sufficient to establish a Section 1 conspiracy. *Id.* at 146-47, 68 S.Ct. 915. But we know of no authority that a Section 2 conspiracy may be established without some showing that more than one of the alleged co-conspirators had at least some awareness that the underlying conduct was anticompetitive or monopolistic.

In support of its conspiracy claim, AMC cites evidence that distributors accepted bids from Syufy requesting excessive clearances. But there is no evidence that any distributor had any reason to know when accepting Syufy bids that the requested clearances were excessive for the San Jose market. AMC also cites in support of its Section 2 conspiracy claim the evidence of Syufy's attempts to condition the licensing of films in its drive-in theaters on exclusive runs in hardtop theaters. But as we have already pointed out (*see* Part I, *supra*), the evidence shows that only one such bid was accepted by a distributor and the film involved in that bid was not shown in a Syufy hardtop theater. That evidence is plainly inadequate to support a jury verdict that

Syufy and the distributor conspired to monopolize the San Jose exhibition market.

Finally, AMC argues that San Jose was the only market in which exclusive runs occurred, but cites no evidence connecting this characteristic of the San Jose market to a conspiracy to monopolize between Syufy and any of its distributors.

In conclusion, we hold that the district court erred in denying Syufy's motion for judgment n.o.v. on AMC's conspiracy to monopolize claim.

V. EVALUATION OF THE GENERAL VERDICT

Having decided that the district court should have granted Syufy judgment n.o.v. on two of the four AMC theories submitted to the jury, we must now decide whether the jury verdict should nonetheless be upheld on the strength of either of the two surviving theories. As a rule, a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30, 82 S.Ct. 1130, 1135-36, 8 L.Ed.2d 305 (1962). In *Brocklesby v. United States*, 767 F.2d 1288 (9th Cir.1985), this court was faced with a case submitted to the jury on three theories of liability: strict liability, breach of warranty, and negligence. Citing *Sunkist*, we held that "the judgment must be reversed if any of the three theories is legally defective." 767 F.2d at 1294. Nevertheless, this court has also held that when one but not all of the theories submitted to the jury lacks evidentiary support, "the reviewing court has discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error." *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir.1980). We need not resolve this apparent conflict, because the general verdict in this case does not survive the test enunciated in *Traver*.

The factors to be weighed in exercising discretion were outlined in *Traver* as follows:

> In deciding whether to exercise this discretion, the reviewing court should determine the potential for confusion of the jury

> which may have resulted from an erroneous submission of a particular claim or cause of action, whether privileges or defenses of the losing party apply to the count upon which the verdict is being sustained so that they would have been considered by the jury with reference to the count, the strength of the evidence supporting the count being relied upon to sustain the verdict, and the extent to which the same disputed issues of fact apply to one or more of the theories in question.

627 F.2d at 938-39.

Initially, we note that potential for confusion of the jury in the instant case was great. The jury was confronted with a complex case involving multiple antitrust theories. Although many of the claims shared common issues of fact, each claim also involved distinctive legal and factual components. We believe there was substantial risk of jury confusion resulting from the erroneous submission of the leverage theory and conspiracy to monopolize claim.

The next relevant factor under *Traver v. Meshriy* is the strength of the claims that were properly submitted to the jury. This factor also weighs against the exercise of our discretionary power to attribute the general verdict to one of the two theories—monopolization and attempted monopolization of the hardtop major film exhibition market—that were supported by substantial evidence. Our review of the evidence leads us to conclude that AMC's case against Syufy was marginal even with respect to these two theories. AMC relied almost exclusively on the conclusory opinion testimony of its own film buyer, Daniel Marks, to fill in crucial gaps in their evidence. Marks's conclusory testimony that Syufy was buying excessive clearances is hardly strong evidence of Syufy's willful maintenance of monopoly power. Moreover, his testimony that AMC suffered causal antitrust injury from excessive clearances was vague as well as conclusory. In fact, it barely qualifies as substantial evidence to support a jury finding on this critical element of AMC's case. Especially given the lack of supporting data with respect to specific theaters and films, we conclude that AMC did not present to the jury a strong case of either monopolization or

attempted monopolization. Accordingly, we hold that this is not an appropriate case under *Traver v. Meshriy* for exercising our discretion to attribute the jury verdict to one of the two AMC theories that were properly submitted to the jury.

VI. THE CLAIMED ERROR IN ADMISSION OF EVIDENCE CONCERNING ACQUISITION OF THE MANN THEATER

Syufy argues that the admission of evidence concerning Syufy's acquisition of the Town and Country Theatre was prejudicial error. Syufy argues that because the Town and Country Theater was acquired after 1975-79, the period at issue, the acquisition was not relevant. We disagree. First, the evidence was relevant to Syufy's specific intent to monopolize. Behavior after the relevant period could shed light on intentions during that period. The district court gave a cautionary instruction to the jury that the evidence was only to be considered on intent. R.T. at 2812. Second, Syufy opened the door to evidence concerning this transaction by first raising the issue in its questions, R.T. at 1734, and by introducing evidence of AMC's post 1979 conduct. R.T. at 158-59.

VII. THE BASIS FOR THE AWARD OF DAMAGES

AMC based its calculation of damages on two comparisons. First, based on a comparison between AMC's Oakridge and Saratoga theaters with the Old Mill Theater in Mountain View near the San Jose region, AMC introduced evidence that it lost $2,423,380 in profits. Second, based on a comparison between AMC's San Jose theaters and AMC's Phoenix area theaters, AMC introduced evidence that it lost $1,593,822 in profits. The jury awarded AMC damages in the amount of $1,006,410.

Syufy argues that AMC's damage calculations were flawed for two reasons. First, Syufy argues that damages may not be calculated on the basis of a comparable market, unless the damaged competitor was totally excluded from the market dominated by a monopolist. Syufy relies on *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877 (8th Cir. 1978), and *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17 (9th Cir.1971), to support this contention. As we read these cases, however, neither supports Syufy's

challenge to the amount of damages. Both cases held that market comparisons cannot be used to establish the fact of causal antitrust injury unless the monopolist's victim is totally excluded from the market. *Admiral Theatre Corp.*, 585 F.2d at 893-94; *Dahl, Inc.*, 448 F.2d at 19. Proof of the amount of damages is governed by a less stringent standard of proof than is the fact of injury. *See Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1927). Syufy cites no authority for the proposition that comparisons may not be used to establish the amount of damage in a market in which the victim of a monopolist competes.

Syufy's second challenge to AMC's damage calculations is based on the contention that the Mountain View and Phoenix markets are not comparable to the San Jose market. Syufy argues that during part of the relevant period, exhibitors in Phoenix engaged in an illegal "split agreement," which Syufy claims was a per se violation of the antitrust laws. Syufy argues that this illegal conduct inflated AMC's Phoenix profits, rendering them an invalid basis for comparison. Comparability is a question of fact. The "split agreement" was in existence for only part of the period of comparison, and there was testimony that the two markets were comparable. It was for the jury to consider Syufy's arguments about the effect of the split on the validity of comparison and to adjust its damage award accordingly. There was sufficient evidence to allow a jury to render a damage award for AMC on the basis of the comparison between San Jose and Phoenix.

In addition, Syufy argues that the Mountain View region is not comparable to San Jose because there was less bidding competition in Mountain View. Again, AMC presented evidence that the two markets were comparable. It is for the jury and not for us to weigh the conflicting evidence. We conclude that AMC presented sufficient evidence to support the damages awarded.

CONCLUSION

In conclusion, we affirm the district court's order, 555 F.Supp. 418, denying Syufy's motion for judgment n.o.v. with respect to two of the theories submitted to the jury—monopolization and

attempted monopolization of the hardtop market. We reverse the district court's order denying Syufy's motion for judgment n.o.v. regarding the conspiracy to monopolize claim. In addition, we hold that there was insufficient evidence supporting AMC's theory that Syufy used its monopoly power in the drive-in market as leverage on the hardtop market. We also hold that this is not an appropriate case for invocation of our discretionary power to affirm a general verdict. Accordingly, we remand to the district court for further proceedings not inconsistent with this opinion with respect to the two theories that were supported by sufficient evidence and for dismissal of the theories not supported by sufficient evidence.

Affirmed in part, reversed in part and remanded.

Appendix B

Appendix B

Syufy Enterprises, Plaintiff,

v.

American Multicinema, Inc.,
AMC Film Management, Inc., and
Durwood, Inc., Defendants.

No. C-79-3052 WHO.

United States District Court,
N.D. California.

July 28, 1982.

MEMORANDUM OPINION

ORRICK, District Judge.

In this difficult and complex antitrust action in which two motion picture exhibitors, namely, Syufy Enterprises ("Syufy"), as plaintiff and counterdefendant, and American Multi-Cinema, Inc. and its related entites ("AMC"), as defendants and AMC as counterplaintiffs, charged each other with violating Section 2 of the Sherman Act by attempting to monopolize and monopolizing the exhibition of first-run motion pictures in the San Jose, California, area, a jury, following a five-week trial, returned a verdict in favor of AMC and assessed damages (before trebling) against Syufy in the amount of $1,006,410. For the reasons which follow, Syufy's post-trial motions for judgment *non obstante veredicto*, or, in the alternative, for a new trial on the counterclaim and, additionally, for a new trial on its Section 2 claim against AMC are DENIED.

I

A

Syufy is an independent motion picture theatre operator which owns and operates over 150 motion picture exhibition screens located in various western states. Defendants are three related corporations: AMC, which owns and operates motion picture exhibition screens located throughout the United States; AMC

Film Management, Inc. ("Film Management"), which acts as a film buying and booking agent for AMC and for various other theatre owners; and Durwood, Inc. ("Durwood"), a holding company which owns a controlling interest in both AMC and Film Management.

Since April, 1973, both Syufy and AMC have owned and operated motion picture exhibition screens in Santa Clara County, California, the focal point of this lawsuit. There are at present thirty major walk-in motion picture theatres ("hardtops"), with a total of seventy-one screens, being operated in Santa Clara County. AMC operates the Oakridge, Saratoga, Old Mill, and Sunnyvale Theatres, a total of twenty-four screens; and Syufy operates the Century 21, Century 23, Century 24, Century 25, and the Century Almaden Theatres, for a total of fifteen screens, and also operates four drive-in theatre complexes in the area. The remaining hardtop theatres in Santa Clara County are operated by United Artists Theatres (eight screens), Blumfield Theatres (eight screens), Jack Gunsky (three screens), and Mann Theatres (one screen).

Syufy and AMC compete with each other for the right to license first-run motion picture films from distributors and to exhibit such films in theatres situated in Santa Clara County, among other places. A brief description of the manner in which motion picture films are licensed for exhibition is helpful in understanding the claims raised by the parties in this case.

The right to exhibit motion picture films under copyright is licensed to exhibitors by distributors on terms and conditions contained in license agreements. Motion pictures can be licensed either by bid or by negotiation. When a distributor licenses a motion picture on a bid, it first sends out a bid invitation to the exhibitors in a particular geographical area announcing the availability date of the motion picture being released. The bid invitation often includes the minimum film rental (calculated as a percentage of the gross theatre admission receipts), and minimum terms (such as a specified minimum film rental and/or advance film rental) that will be acceptable to the distributor, and may also specify whether the picture is being offered on an "exclusive" basis, so that only one theatre in a particular area can exhibit the picture during a given run, or on a "nonex-

clusive" ("day and date") basis. The distributor may in turn accept one or more bids, or reject all bids and rebid the picture, or enter into negotiations with interested exhibitors for the licensing of that motion picture.

In order to earn a profit for the exhibitor, a theatre must gross more than its operating expense and the cost of film rental paid to the distributor. Thus, in bidding for a particular film, the exhibitor must first evaluate the potential gross of the motion picture and submit a bid offer of film rental to the distributor high enough to obtain the award of the picture, but not so high as to incur losses in exhibiting the film.

On October 31, 1979, Syufy brought this action for damages and injunctive relief pursuant to 28 U.S.C. § 1337, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, Sections 4, 12 and 16 of the Clayton Act, as amended, 15 U.S.C. §§ 15, 22, 26, and California Business and Professions Code Sections 16,600 *et seq.*, 16,720 *et seq.* and 17,000 *et seq.* The gravamen of the complaint is that, commencing in April, 1973, when AMC opened its first theatre in Santa Clara County, AMC and its related entities combined among themselves and conspired with various motion picture distributors to restrain trade in the exhibition of first-run motion pictures in Santa Clara County and to monopolize the relevant market through conduct violative of Sections 1 and 2 of the Sherman Act and state unfair competition laws.

The complaint sets forth eight specific actions and/or courses of conduct allegedly engaged in by defendants with the purpose and intent of destroying Syufy's ability to compete for first-run motion pictures in Santa Clara County:

1. Hiring away Syufy's head film buyer in order to learn Syufy's confidential business operations and to disrupt and cripple Syufy's theatre operations in Santa Clara County;

2. Strategically surrounding Syufy's theatres in Santa Clara County with defendants' new theatres having eighteen screens and defendants' newest theatre, scheduled to open in February, 1980, with an additional six screens;

3. Consistently operating their Santa Clara County theatres below cost;

4. Subsidizing their Santa Clara County theatres, where defendants are competing against Syufy, with the profits obtained from their theatres and operations located outside of the greater San Jose metropolitan area where the defendants have either little or no competition;

5. Subsidizing the losses incurred by defendants in their theatres in competition with Syufy by funds generated out of defendants' nationwide network of theatre operations;

6. Establishing pocket monopolies by organizing buying and booking combines of exhibitors for the purposes of eliminating competition, creating noncompetitive profits, and funding predatory below cost bidding in areas where independent exhibitors, such as Syufy, refuse to become a part of defendants' combine policy;

7. Attempting to force and forcing independent exhibitors into splitting agreements; and

8. Block booking motion pictures in their theatres.

Syufy alleges that defendants, through the above-described conduct, have had and will continue to have the effect of substantially restraining competition in the distribution and exhibition of first-run motion pictures in Santa Clara County, and of increasing admission prices for the movie-going public.

On November 26, 1979, AMC filed its counterclaim for damages and injunctive relief for violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. AMC alleged that Syufy had at all relevant times possessed monopoly power in both indoor and drive-in exhibition of major films in the San Jose zone of Santa Clara County, and that Syufy used its monopoly power and conspired with various distributors and exhibitors to restrain trade and eliminate competitors, including AMC, in this market by engaging in the following conduct:

1. Syufy individually, and in combination, conspiracy, and agreement with the co-conspirators, has excluded AMC from the

opportunity to exhibit first-run motion picture films in Santa Clara simultaneously with the exhibition thereof at motion picture theatres owned and operated by Syufy through a system of unreasonable and unlawful clearances. Syufy has made as a condition of its bid or negotiation to license first-run motion picture films that AMC's theatres in Santa Clara be excluded from any simultaneous run thereof. The co-conspirators have agreed with, acquiesced in, and aided and abetted, Syufy in implementing and effectuating such unlawful system of clearances.

2. Syufy, in combination, conspiracy and agreement with the co-conspirators, has consistently and systematically entered into license agreements for the exhibition of first-run motion picture films in Santa Clara by the terms of which, among others, Syufy has agreed to pay substantially less as film rental than would have been paid by AMC pursuant to bids submitted by AMC for the exhibition of such films.

3. Syufy and the co-conspirators have by combination, conspiracy and agreement engaged in a systematic and concerted practice and pattern of excluding AMC from the opportunity to compete fairly with Syufy for the right to exhibit first-run motion picture films in Santa Clara. Such practices include, but are not limited to, the rigging of bids and sham awarding to Syufy of license agreements by the co-conspirators. The co-conspirators have made available to Syufy prior to licensing of films all information regarding sealed bids made by AMC therefor, and the co-conspirators have granted Syufy the opportunity of licensing such films by meeting the terms and conditions of sealed bids submitted by AMC.

4. Syufy has conditioned its licensing of first-run motion picture films at its drive-in theatres in Santa Clara upon the co-conspirators' awarding license agreements to Syufy for the exhibition of films at Syufy's hardtop theatres under terms and conditions substantially inferior to those terms and conditions under which AMC has offered to license such films for exhibition by AMC.

B

During the course of this litigation, the Court made several important rulings that substantially narrowed the scope of the lawsuit and the number of claims that were ultimately submitted to the jury.

On July 17, 1980, the Court issued its pretrial order, setting March 3, 1981, as the date for the termination of discovery and for the filing of pretrial statements, including the identification of any proposed amendment to the pleadings, in accordance with Local Rule 235-7. The trial date was set for March 23, 1981, but was subsequently continued to November 30, 1981.

On April 10, 1981, five weeks *after* the discovery cutoff date, the Court held a further pretrial conference, during which it determined that Syufy had failed to comply with the provisions of the Court's pretrial order governing the conduct of discovery. The Court found that Syufy had failed to respond adequately to numerous interrogatories and requests for documents and, most importantly, had failed to provide specific information underlying Syufy's claim for conspiracy under Section 1 of the Sherman Act. The Court, pursuant to Rule 37(b)(2)(B) of the Federal Rules of Civil Procedure, imposed monetary sanctions upon Syufy, and ruled that it would limit the evidence that could be introduced at trial in support of Syufy's Section 1 claim and would strip certain issues from the trial because of Syufy's unjustifiable and repeated failure to afford adequate discovery. R.T. p. 6, line 20—p. 8, line 14.

On April 24, 1981, Syufy moved for leave to amend its complaint in order to include, *inter alia*, the identification of six major motion picture distributors as alleged "co-conspirators" and certain additional acts and/or courses of conduct allegedly engaged in by the defendants and the "co-conspirators." After still another hearing on May 29, 1981, the Court denied the motion for leave to amend, on the grounds that Syufy's delay in seeking to amend the complaint was inexcusable because Syufy possessed the relevant facts prior to the discovery cutoff date, and that the proposed amendments would significantly broaden the scope of the lawsuit, necessitating additional discovery, imposing

unjustifiable hardship upon defendants, and coming dangerously close to "trial by ambush." R.T. p. 3, line 13—p. 11, line 7.

On June 23, 1981, Syufy filed a second lawsuit, No. C-81-2642 WHO, based upon a new complaint substantially identical to the first complaint, but setting forth the allegations which Syufy had sought to include by way of amendment. On September 18, 1981, the Court, noting that the second lawsuit appeared to be an attempt to circumvent the Court's prior rulings, denied Syufy's motion to consolidate the two actions for trial, and granted defendants' motion to stay all discovery in the second case pending entry of judgment in the first case.[1] R.T. p. 12, lines 7-13; p. 23, lines 20-24.

On November 6, 1981, the Court granted defendants' motion for summary judgment on Syufy's Section 1 claim, ruling that the three named defendants, AMC, Film Management, and Durwood, constituted a single business entity, and thus that the threshold requirement of Section 1 of a plurality of actors had not been met. On November 20, 1981, the Court granted defendants' motion for partial summary judgment on any damage claim arising out of the licensing and exhibition of motion picture films that were bid subsequent to October 31, 1979, and denied defendants' motion for summary judgment on the allegations contained in Section 11(f) of the complaint pertaining to defendants' alleged plan to destroy Syufy in retaliation for Syufy's refusal to participate in an alleged buying and booking combine.

At the close of all the evidence at trial, the Court granted Syufy's motion for a directed verdict on AMC's counterclaims under Section 1 of the Sherman Act and Section 3 of the Clayton Act, on the grounds that AMC had not presented sufficient evidence of these claims to warrant their submission to the jury. The Court took under submission Syufy's motion for a directed

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[1] On May 28, 1982, following the trial of the first action, the Court reiterated its concern that allowing Syufy to proceed with the second lawsuit would effectively permit it to circumvent the sanctions earlier imposed by the Court, and suggested that counsel for AMC move to dismiss the second lawsuit. R.T. p. 3, line 4—p.5, line 17. Thus far, counsel has not responded to the Court's suggestion.

verdict on its Section 2 claim against defendants and on AMC's Section 2 counterclaim.

On January 7, 1982, Syufy's Section 2 claim that AMC attempted to monopolize the exhibition of first-run films in Santa Clara County, and AMC's Section 2 claim that Syufy had a monopoly and attempted to monopolize the exhibition of major first-run films in the San Jose zone, were submitted to the jury. On January 8, 1982, the jury returned a verdict for AMC and against Syufy on the affirmative complaint, and for AMC and against Syufy on the counterclaim, and awarded AMC $1,006,410 in damages. Judgment was entered on the verdict on February 11, 1982, and Syufy's motions for judgment *non obstante veredicto*, or, in the alternative, for a new trial on the counterclaim, and for a new trial on the affirmative complaint followed.

II

The standards for granting a judgment *non obstante veredicto* are the same as those for granting a directed verdict, and the well-settled rule is that a court may grant a motion for judgment *non obstante veredicto* only if, without passing upon the credibility of the witnesses, it finds that the evidence and its inferences, considered as a whole and viewed in the light most favorable to the nonmoving party, does not provide "substantial evidence" in support of the verdict. *See, e.g., In Re Data General Antitrust Litigation*, 529 F.Supp. 801, 812 (N.D.Cal.1981); *Inglis v. ITT Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir. 1981). "Substantial evidence" has in turn been described as more than a "mere scintilla" and as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938). Where the evidence is "substantial," the Court is not free to weigh the evidence for itself or to reach a result that it finds more reasonable. *Inglis, supra.*

By contrast, the standard for granting a new trial permits the Court to consider the weight of the evidence and the credibility of the witnesses, and the Court may set aside a verdict, even if it is supported by substantial evidence, if it is contrary to the clear

weight of the evidence or is based upon evidence which is false, or whenever in the exercise of sound discretion the trial judge thinks his action necessary to prevent a miscarriage of justice. *Id.*at 1027.

III

Application of the legal standards set forth above to the evidence presented in this case leads to the conclusion that Syufy's motion for judgment *non obstante veredicto,* or, in the alternative, for a new trial on AMC's counterclaim for monopoly and attempt to monopolize must be denied.

A

With respect to the monopoly claim, Syufy first contends that, given the existence of a competitive bidding market, and absent evidence of complicity between exhibitors and distributors, the unilateral action of an exhibitor cannot give rise to liability for monopoly as a matter of law. Syufy's position rests on the rationale that competitive bidding assures all exhibitors in a given area equal access to films, and that an exhibitor in such a market cannot be held liable for monopoly, even if he is awarded 100 percent of the films, because it is the distributor, and not the exhibitor, who ultimately decides where motion pictures will be exhibited. The Court rejects this novel legal theory, raised for the first time in Syufy's post-trial motion, noting that such a rule has never been articulated in the case law and that, in any event, it is the very question as to whether each exhibitor is able to receive fair consideration for his bid which lies at the heart of this lawsuit.

Syufy further contends that, even if a finding of monopoly power is not precluded as a matter of law in this case, the verdict cannot stand because there was a critical failure of proof as to each of the elements necessary to establish a claim for monopoly. The essential elements that must be proved to establish a claim for monopolization under Section 2 of the Sherman Act are: (1) the possession of monopoly power in a relevant market; (2) the willful acquisition or maintenance of such power; and (3) causal antitrust injury. *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *Greyhound Computer Corp.*

v. IBM, 559 F.2d 488 (9th Cir.1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978).

With regard to the first element, the possession of monopoly power in a relevant market, the Court finds that AMC's definitions of the relevant product and geographic markets were supported by substantial evidence, and that AMC presented sufficient evidence of Syufy's market share and its power to support a jury finding of monopoly power. The Court instructed the jury as to Syufy's definition of the relevant market, "the exhibition of first-run films in Santa Clara County, from the Southern Boundary of the San Jose Zone to the San Mateo County Boundary," and AMC's definition of the relevant market, "major first-run film licensed for exhibition in the San Jose Zone, or alternatively, the San Jose Zone and Sunnyvale," and explained to the jury that it was free to accept the definition proposed by either of the parties or to develop its own definition of the relevant markets based on the evidence. Substantial evidence was adduced at trial in support of AMC's position that "major" first-run films, those twenty to forty films which the industry anticipates will have superior box office grossing potential, constitute an economically significant, industry-recognized product submarket, and that the San Jose zone is an appropriate geographic market, based upon commercial realities of motion picture exhibition and encompassing the area in which Syufy and AMC were engaged in substantial competition.

AMC established the existence of Syufy's monopoly power in the relevant market through evidence showing that Syufy's market share was at all relevant times greater than 62 percent, and expert testimony suggesting that Syufy's market share was sufficiently high to justify an inference of monopoly power, given the fragmented distribution of the remaining market shares among competing distributors. AMC also demonstrated that Syufy possessed an essential hallmark of monopoly power, the power to exclude competition, through evidence that Syufty had successfully created barriers to entry by other major first-run film exhibitors at a time when the San Jose market had grown substantially and Syufy had more than doubled its own capacity.

With respect to the second element of a monopolization claim under Section 2, namely, the willful acquisition or maintenance of monopoly power, AMC presented substantial evidence at trial demonstrating that Syufy had engaged in anticompetitive conduct for the purpose of maintaining its monopoly power and eliminating competition in the market. Such conduct included Syufy's use of its monopoly power in the drive-in market to induce distributors to award exclusive hardtop runs by the submission of conditional drive-in bids; Syufy's use of predatory bidding to obtain exclusive runs; threats made by Syufy's owner, R.J. Syufy, against AMC; and Syufy's acquisition of its largest competitor, the Mann Theatre, shortly before the commencement of this lawsuit.

With respect to the third element required to establish monopoly, namely, causal antitrust injury, Syufy contends that AMC has failed to present any competent evidence demostrating that AMC earned lesser profits as a proximate cause of Syufy's alleged monopolization, and that the damage award must be set aside as speculative because AMC did not present any evidence of damages sustained on specific films at specific theatres. AMC's proof of fact and amount of damage rested on a comparability study which demonstrated that AMC's theatres in the relevant market were substantially less profitable than comparable AMC theatres in the markets of Mountain View, California, and Phoenix, Arizona. AMC presented testimony at trial establishing the comparability of these markets, and suggesting that the only plausible reason for the relatively poor performance of AMC's theatres in the San Jose market was the inability of those theatres to obtain a fair share of top first-run films. Under the applicable law, AMC was required to establish a reasonable probability that it lost profits at its San Jose theatres were proximately caused by Syufy's anticompetitive conduct, and was not required to negate all possible alternative explanations for such losses. *Greyhound, supra.* The Court finds that AMC introduced sufficient proof to permit the jury to infer that AMC sustained injury as a proximate result of Syufy's monopolization of major first-run films in the San Jose zone.

With regard to the amount of damage, the Court rejects Syufy's argument that a damage award is inherently speculative

unless based upon a picture-by-picture analysis. The use of the "yardstick" or comparison method of proving damages was first upheld in *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946), where the Court held that damages could be calculated by comparing the success of a given theatre before and after the onset of the anticompetitive conduct, or by comparing the performace of other theatres in different but comparable markets, where the decline in profits is not shown to be attributable to other causes. This comparison method has been approved in numerous antitrust cases since *Bigelow: See e.g., Shannon v. Crowley*, 538 F.Supp. 476 (N.D.Cal. 1981); *Fox West Theatres Corp. v. Paradise Theatre Building Corp.*, 264 F.2d 602 (9th Cir.1958); 11 Von Kalinowski, Antitrust Laws and Trade Regulation § 81.09(5). Furthermore, in the absence of any decisions explicitly holding that the comparison method of proving damages is limited to cases involving complete exclusion from the market and is inappropriate in cases where the plaintiff could or did bid for individual films, the Court rejects Syufy's argument that AMC's comparability study should be held insufficient to establish the amount of damages under the circumstances presented here.

B

Syufy's arguments with regard to AMC's claim for attempted monopolization under Section 2 of the Sherman Act are directed exclusively to the sufficiency of the evidence and in large part reiterate the arguments made with respect to AMC's monopolization claim, already rejected by this Court. The essential elements of a claim for attempt to monopolize under Section 2 are: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. *Inglis, supra.* Although these three elements are separate and distinct, it is clear that the existence of a dangerous probability of success may be inferred from evidence of specific intent to control prices or destroy competition, and predatory or anticompetitive conduct directed towards that end. *Id.* Indeed, the most recent decision in this Circuit to address the issue indicates that all three

elements of a claim for attempt to monopolize may be satisfied by evidence of conduct that is clearly threatening to competion or is clearly exclusionary. *Twin City Sportsservice, Inc. v. Charles O. Finley & Co.* 676 F.2d 1291 (9th Cir.1982).

Syufy's anticompetitive conduct, which was discussed in the context of Syufy's willful acquisition and maintenance of its monopoly power, above, and which took the form of using its monopoly position in the drive-in market to induce distributors to award exclusive hardtop runs, predatory bidding to obtain exclusive runs, and the acquisition of its largest competitor, the Mann theatre, was in itself sufficient to permit the jury to infer that Syufy possessed the specific intent required for attempt to monopolize. Moreover, AMC presented direct evidence of Syufy's anticompetitive intent in the form of threats by R.J. Syufy to run AMC out of town if AMC did not either sell out to Syufy or get out of San Jose. The probability that Syufy would be successful in obtaining a monopoly could in turn have been inferred from the evidence of Syufy's anticompetitive intent and conduct, and was further demonstrated by proof of Syufy's market power, which was always in excess of 62 percent. It has previously been demonstrated that AMC suffered causal antitrust injury attributable to Syufy's anticompetitive conduct. Thus, the Court finds that AMC has met its burden of presenting substantial evidence in support of each of the elements required to establish a claim for attempted monopolization in violation of Section 2 of the Sherman Act.

Having determined that Syufy is not entitled to judgment *non obstante veredicto* on AMC's counterclaim for monopolization, the Court further finds that Syufy's alternative motion for a new trial on the counterclaim must be denied, because it cannot be said that the verdict is contrary to the clear weight of the evidence or that allowing the verdict to stand would result in a miscarriage of justice.

Finally, Syufy urges this Court to set aside the verdict and grant a new trial on its claim against AMC, Film Management and Durwood for attempt to monopolize in violation of Section 2 of the Sherman Act. Syufy had every opportunity to present its claim to the jury, based upon evidence which included proof of defendants' alleged plan to eliminate competition among film exhibitors through the organization of buying and booking coop-

eratives. The jury could reasonably have found that the evidence of AMC's alleged intent to destroy Syufy as a competitior was unconvincing, or that defendants never engaged in conduct directed towards accomplishing that intent. In any event, the Court does not find that the evidence presented at trial in support of Syufy's Section 2 claim was so clear and overwhelmning as to justify granting a new trial.

IV

For the reasons stated above, the Court finds that the jury verdict is fully supported by the law and the evidence in this case, and that the judgment entered upon the verdict must stand. With respect to AMC's counterclaim for monopolization in violation of Section 2 of the Sherman Act, the Court rejects Syufy's argument that a finding of monopoly on the basis of an exhibitor's unilateral action in a bidding market is precluded as a matter of law, and finds that AMC presented substantial evidence at trial in support of each of the essential elements of a monopolization claim, namely, the possession of monopoly power in a relevant market, the willful acquisition or maintenance of such power, and casual antitrust injury. Similarly, with respect to AMC's counterclaim for attempt to monopolize in violation of Section 2, the Court rejects Syufy's arguments, which are directed exclusively to the sufficiency of the evidence, and finds that each of the elements necessary to establish a claim for attempt to monopolize, namely, specific intent to control prices or destroy competition, predatory or anticompetitive conduct, and dangerous probability of success, were proven by substantial evidence. Finally, with respect to Syufy's Section 2 claim against AMC for attempt to monopolize, the Court finds that, on the basis of the evidence presented at trial, the jury could reasonably have concluded that AMC did not engage in anticompetitive conduct causing injury to Syufy.

Accordingly, IT IS HEREBY ORDERED that Syufy's motions for judgment *non obstante veredicto* or, in the alternative, for a new trial on AMC's counterclaim under Section 2 of the Sherman Act, and for a new trial on its Section 2 claim against AMC, are denied.

Appendix C

Appendix C

Statutory Provisions Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1, states:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 2 of the Sherman Act, 15 U.S.C. § 2, states:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."